Supreme Court, U.S.
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(2)

No. 90-818

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

PAUL A. RICHTER, an individual dba "THE BODY SHOP",

Petitioner,

v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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This case comes before the Court on a petition by Paul Richter, dba "The Body Shop", plaintiff-appellant below, for a Writ of Certiorari. At issue is a

judgment of the Court of Appeal for the State of California, Fourth Appellate District, Division One which upheld the Superior Court's ruling on summary judgment granted the respondents.

STATUTE/MUNICIPAL CODE INVOLVED

Petitioner correctly stated that this case involves San Diego Municipal Code, Chapter III, Article 3, Division 36, section 33.3610. In addition, this case necessarily involves sections 33.3602 and 33.3615, contained in the same Chapter, Article and Division:

§ 33.3602 Purpose and Intent

> It is the purpose and intent of this division to provide for the orderly regulation of the business of nude entertainment and nude entertainers in the City of San Diego by establishing certain minimum standards for the conduct of this type of business to protect the public order and the general welfare of the residents of the City of San

Diego.

§ 33.3615 Exemptions

Except as to the provisions of Section 33.3610(e), (f) and (g), the provisions of this Division shall not apply to the following:

(a) Any theater, concert hall, or similar establishment which is primarily devoted to theatrical performances. Any establishment claiming exemption from regulation pursuant to this subsection shall be subject to licensing and regulation pursuant to Divisions 15 or 16 of this Article, as appropriate, pending administrative or legal determination as to its exempt status under this Division.

(b) Any studio which is operated by any state college or university or public community college or school wherein the persons, firm, association, partnership, or corporation operating it have met the requirements established in Division 21 of the California Education Code for the issuance or conferring of, and is in fact authorized thereunder to issue and confer, a diploma or honorary diploma.

(c) Any premises where there is conducted the business of furnishing, providing or procuring figure models solely for any studio

described in subdivision (b) of this section.

STATEMENT OF THE CASE

In the interest of brevity, respondents accept the petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should not be granted because the First Amendment questions here were not raised in the court below, wherein Petitioner/Plaintiff challenged the constitutionality of the Municipal Code section on the grounds of vagueness, cruel and unusual punishment, and equal protection. In addition, the issue presented was properly decided below on settled law, and is not of sufficient importance for review by this Court.

ARGUMENTS

I

THE QUESTIONS PRESENTED BY PETITIONER WERE NOT RAISED OR PRESERVED BELOW

Petitioner raises two questions in his petition which, essentially, argue that there was an unmet burden of proof on respondent in regulating petitioner, insofar as petitioner's activity involved the First Amendment. Petitioner did not raise a First Amendment issue in the trial court. As can be seen by the Memorandum Decision of the trial court (Petn, Appen. C, pp. C1-C2), petitioner challenged the constitutionality of the San Diego Municipal Code sections at issue on the rounds of vagueness, cruel and unusual punishment and equal protection. On appeal, petitioner stated that:

The substance of Plaintiff's complaint is that:

A. Division 36 of the SDMC (containing the alleged sections violated) does not apply to him and his business ON THE FACE OF THE ORDINANCE.

B. Alternatively, any attempt to apply the subject SDMC sections (i.e., §§ 33.3610(e), (f) and (g) to Plaintiff would be predicated on a reading of the ordinance that, at best, would be patently ambiguous, and therefore unconstitutional.

C. The subject ordinances are unconstitutional in that they are violative of the fundamental right of due process and equal protection, and in particular they have been selectively applied to Plaintiff (i.e., by their enactment and application).

(Appen. A, pp. A-9-A-10.)

The questions presented to this Court have, therefore, not been presented by petitioner in the decisions rendered

against petitioner. The case is thus inappropriate for review by the United States Supreme Court. See, Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194, 196-197 (1965); Hanson v. Denckla, 357 U.S. 235, 243-244 (1958).

II

THE DECISION BELOW GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM CORRECTLY

Petitioner argues that this case is appropriate for review because the lower court recognized a presumption of constitutionality of the San Diego Municipal Code in the face of petitioner's assertion of First Amendment issues. The lower court did, in its opinion, examine the First Amendment issue. The court found that petitioner's citation of Morris v.

Municipal Court, 32 Cal.3d 553 (1982), which holds that a ban on nude dancing is impermissible, is not applicable to this case because San Diego permits nude dancing. The court instead applied BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986), a case virtually on point, which holds that a requirement for nude dancers to maintain a six-foot distance from patrons is constitutionally permissible. Since petitioner has not asserted that his case is factually different from BSA, Inc., or that BSA, Inc. was improperly decided, there is no basis for further review.

III

THE ISSUE RAISED BY PETITIONER IS NOT IMPORTANT AND AN INCORPORATING ISSUE IS BEING CONSIDERED BY THE COURT IN ANOTHER CASE

At issue in this case is the validity of a municipal ordinance requiring nude entertainers to remain six feet distant from patrons. This precise issue was clearly decided by BSA, Inc. v. King County, supra, 804 F.2d 1104. BSA, Inc. has remained undisturbed and unchallenged, and has been cited with approval by other circuit-level decisions for its recognition of the First Amendment implications of nude dancing. See, e.g., Miller v. Civil City of South Bend, 904 F.2d 1081, 1087 (7th Cir. 1990). Miller is presently being reviewed by this Court on the overlying issue of municipal prohibition

of nude dancing. Barnes v. Glen Theatre, Inc. (No. 90-26). Accordingly, review of a six-foot distance rule within a permissive scheme is lacking in import for review by this Court at this time.

CONCLUSION

The case began at the trial level as a challenge based, in essence, on vagueness in application and equal protection. At the appellate level it was treated as such, but with a brief reference to an overbreadth issue not raised initially by petitioner. In that reference, the California Court of Appeal, Fourth District, briefly distinguished petitioner's case and recognized the settled law.

The petition is in this Court for review on questions not raised or

properly reviewed below. Additionally, the ultimate issue of the six-foot rule has long been settled in law, and is not of sufficient import for review by this Court. For these various reasons, the Petition for Writ of Certiorari should not be granted.

DATED: February 18, 1991

Respectfully submitted,

JOHN W. WITT, City Attorney

By

Grant Richard Telfer
Deputy City Attorney

Attorneys for Defendant
City of San Diego

APPENDIX A

COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT
DIVISION ONE

PAUL A. RICHTER, an individual, dba "THE BODY SHOP",	)
Plaintiff-Appellant,	)
v.	)
THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego; and DOES 1 through 50, inclusive,	)
Defendants-Respondents.	)

Court of Appeal No D009709
Superior Court No. 604265

APPELLANT'S OPENING BRIEF

Appeal from the Superior Court of the State of California, in and for the County of San Diego, Honorable James R. Milliken, Judge

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COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PAUL A. RICHTER, an individual, dba "THE BODY SHOP",

Plaintiff-Appellate,

v.

THE CITY OF SAN DIEGO; ROBERT BURGREEN, Chief of Police of the City of San Diego; and DOES 1 through 50, inclusive,

Defendants-Respondents.

Case No. D009709
Superior Court No. 604265

Appeal from the Superior Court of San Diego County Honorable James R. Milliken, Judge

APPELLANT'S OPENING BRIEF

I

INTRODUCTION

Plaintiff appeals the court's granting of Defendants' Motion for Summary Judgment on March 3, 1989, and the finding that there is no triable issues of any material fact, and that Defendants' are entitled to judgment as a matter of law. (C.T. 188, 189).
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II

STATEMENT OF THE CASE

Plaintiff operates a business offering theatrical demonstrations or exhibitions, amusements, and viewing by knowingly consensual audience desirous of viewing same in the assertion of his/her/their First Amendment rights (C.T. 2,3). Said business is located in the City of San Diego, County of San Diego, State of California. The conduct of Plaintiff's business is authorized as a theatre under the San Diego Municipal

Code ("SDMC") and a permit has been duly issued (C.T. 17).

Defendant CITY did allegedly enact, adopt, and amend various sections of certain ordinances under the SDMC. More specifically, the sections of certain ordinances which are the subject of Plaintiff's complaint are designated under Division 36, §§ 33.3601 through and including 33.3620 (C.T. 102-106). The Plaintiff did not seek an exemption from regulation under Division 36 because Plaintiff does not hold a license pursuant to Division 36. Defendant CITY notified Plaintiff of its intention to sanction Plaintiff by way of suspension of his theatre permit due to alleged violations of SDMC §§ 33.3610(e), (f) and (g) (C.T. 17-18). Regulatory action was initiated to

suspend Plaintiff's theatre permit for thirty (30) days. This action led to an administrative hearing at which time the factual violations were stipulated and the matter was submitted on the legal issues. the hearing officer decided to uphold the action of Defendant. However he refused to rule on the constitutionality of the subject ordinances (C.T. 73).

After the San Diego City Council denied Plaintiff's appeal

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the San Diego Police Department issued a letter to Plaintiff on September 22, 1988, advising him that a thirty-day suspension would commence on October 1, 1988, thus putting Plaintiff out of business for said period (C.T. 19).

Plaintiff filed his complaint for Declaratory Relief and Injunctive Relief

(To determine validity of ordinance) on September 30, 1988 (C.T. 1), and obtained a Temporary Restraining Order against the imposition of the subject suspension along with obtaining a Preliminary Injunction against imposing same, issued November 20, 1988 (C.T. 75-76).

Defendants filed their Motion for Summary Judgment on November 30, 1988 (C.T. 78). Said Motion was heard on January 27, 1989. The Honorable James R. Milliken rendered his "Memorandum Decision" on the defendants' Motion on February 22, 1989 (C.T. 161-162), and Order for Entry and granting of same on March 3, 1989 (C.T. 188-189).

Defendant filed his Notice of Appeal on March 8, 1989 (C.T. 191).

The substance of Plaintiff's complaint

is that:

A. Division 36 of the SDMC (containing the alleged sections violated) does not apply to him and his business ON THE FACE OF THE ORDINANCE.

B. Alternatively, any attempt to apply the subject SDMC sections (i.e., §§ 33.3610(e), (f) and (g)) to Plaintiff would be predicated on a reading of the ordinance that, at best, would be patently ambiguous, and therefore unconstitutional.

C. The subject ordinances are unconstitutional in that they are violative of the fundamental right of due process and equal protection, and in particular they have been selectively

applied to Plaintiff (i.e., by their enactment and application).

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III

RELIEF SOUGHT

Plaintiff seeks the relief of this Court by way of reversing the granting of Defendant's Motion for Summary Judgment and remanding the case for trial based on the lower court's error(s) including:

A. The granting of Defendants' Motion for Summary Judgment where there were triable issues of fact including but not limited to the question of "selective" application of the subject ordinances to Plaintiff.

B. The granting of Defendant's Motion for Summary Judgment in finding that the subject

ordinances apply to Plaintiff.

C. The granting of Defendants' Motion for Summary Judgment and relying on the presumption of constitutionality of the subject ordinance for the particular business of Plaintiff.

D. The determination that the subject ordinances although "GRAMMATICALLY UNFORTUNATE" are/is still constitutional.

E. The finding that notwithstanding a "dirth" [sic] of evidence from the Defendants relative to valid legislature purpose the subject ordinances was/were still constitutional.

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IV

ARGUMENT

A. There Are Triable Issues of Fact

Alleged By Plaintiff In His Verified Complaint.

In his verified complaint (C.T. 1-21) Plaintiff avers that the subject ordinances are violative of the fundamental right of due proces and equal protection in that they have been that to Plaintiff. The Court will see that the record on appeal is totally void of any declarations or other evidence to rebut the verified averment.

Further, the application of the ordinance to Plaintiff in a selective fashion is a factual question - not one of law. On this basis alone the Superior Court erred in granting Defendants' Motion for Summary Judgment.

It is proper for a Court to grant a motion for summary judgment only if the supporting papers are sufficient to

sustain a judgment as a matter of law in favor of the moving party and the opposing party has not presented any facts which give rise to a triable issue as to any material fact. Cal. Code of Civil Procedure ("CCP") §437c. Plaintiff has raised triable issues of fact which the Defendants have failed to rebut in their motion.

Summary judgment is a drastic procedure and should be used with caution so that it does not become a substitute for the open trial method of determining facts. Corwin v. Los Angeles Newspaper Service Bureau, Inc., 4 Cal.3d 842, 851-852, 94 Cal.Rptr. 785, 484 P.2d 952 (1971). It must be clear from the declarations and affidavits that there is/are no triable issue(s) of fact. Summary judgment deprives the

losing party

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of a trial on the merits and may not be invoked unless it is clear. Bunzel v. American Academy of Orthopaedic Surgeons, 107 Cal.App.3d 165, 165 Cal.Rprt. 433 (1980).

Summary Judgment is only proper if the supporting affidavits are sufficient to sustain a judgment for the moving party and the opposing affidavit does not show facts sufficient to present a triable issue of fact. The moving party's affidavits are strictly construed and the opponent's liberally construed, and doubts as to the propriety of summary judgment are resolved against granting the motion. Jos. Schlitz Brewing Co. v. Downey Distributor, 109 Cal.App.3d 908, 914, 916, 167 Cal.Rptr. 12, (1967).

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B. The Subject Ordinance Does Not

Apply to Plaintiff.

By following the steps as indicated below one can readily determine that the ordinance (i.e., SDMC §§ 33.3610(e), (f) and (g) doe not apply to Plaintiff.

1. Examine Division 36 of the SDMC (C.T. 102-106).
2. SDMC § 33.3604 defines "licenses" as the license required by this division (C.T. 102).
3. SDMC § 33.3615 states the provision of this Division (i.e., 36) do not apply to a theatre except for SDMC §§ 33.3610(e), (f) and (g) (C.T. 106).
4. Plaintiff maintains a theatre permit for the subject business and is not licensed under Division 36.
5. SDMC §§ 33.3610 (f) and (g)

allegedly prohibit certain types of activity on licensed premises! (C.T. 105).

6. The alleged activity is the very type for which Defendants were attempting to shut Plaintiff down for THIRTY (30) days.

In summary, by the very ordinance, the prohibition provisions of SDMC §§ 33.3610(e), (f) and (g) specifically state they apply to licensed premises, and by a reasonable reading defines that term under SDMC § 33.3604. However, Plaintiff is licensed by a Division of the SDMC other than Division 36.

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C. In A Constitutional Challenge Of The Type Before The Court The Presumption Against Unconstitutionality Does Not Apply.

In the Supreme Court case of Morris v.

Municipal court for The San Jose - Milpitas Judicial District of Santa Clara County (1982) 32 Cal.3d 553 substantially identical issues were raised as in the instant cause, including the summary judgment hearing. The holding in Morris is clearly that an enactment (e.g. ordinance) prohibiting non-obscene nude dancing which extends beyond establishments serving liquor is presumptively overbroad. Plaintiff DOES NOT SERVE LIQUOR. Therefore, the subject ordinance is presumptively overbroad on its face. Further, Defendants have not overcome that presumption in any manner.

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D. The Defendant Is Compelled To Submit and Prove Compelling State Interest To Uphold A Constitutional Challenge To The Type Of Ordinance

Involved.

In his Memorandum Decision (C.T. 162, lines 12-13) Judge Milliken states ". . . Notwithstanding a dirth [sic] of evidence from the City as to actual legislative purpose of the statute, . . .".

That basis for deciding the Defendants' Motion for Summary Judgment is replete with error, at the minimum, when compared to the clear and unequivocal language contained in Morris, supra.

Morris contains a superb summary of the law relative to the statutes and ordinances aimed at limiting theatrical nude entertainment. Further, the distinction is patently drawn between such statutes and ordinances whose purpose is to control theatrical nude

entertainment in settings where alcoholic beverages are served verses [sic.] those in which none are served.

In that latter type setting Morris holds that to overcome a constitutional challenge there must be a showing that it (the ordinance) is "narrowly drawn" and furthers "a sufficiently substantial government interest."

Simply stated, the record in the instant case is totally void of any showing of furthering "a sufficiently substantial government interest" and that it (the ordinance) was "narrowly drawn".

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E. The Moving party Bears The Burden To Establish That The Claims Of The Opposing Party Are Entirely Without Merit On Any Legal Theory.

The moving party bears the burden of

furnishing supporting documents that establish that the claims of the adverse party are entirely without merit on any legal theory. Lipson v. Superior Court, 31 Cal.3d 362, 374, 182 Cal.Rptr. 629, 644 P.2d 822 (1982). The Defendants presented broad legal theories in support of a motion for summary judgment. However, the Defendants have not brought forth any proof through declarations or affidavits that the claims of the Plaintiff are entirely without merit on any legal theory. The Defendants must show, among other items, that the Plaintiff has not right to have a judge determine if an ordinance is being unconstitutionally applied to him.

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F. Plaintiff Has Raised Triable Issues of Fact Re The Constitutionality Of The Subject Ordinance; The Triable

Issues Should Not Be Decided By Summary Judgment.

The Plaintiff has a triable issue of fact that should not be decided through summary judgment. SDMC § 33.3604(e) ("Definitions"), states that "LICENSE" shall mean the business license to operate a nude entertainment business required by this division. The Plaintiff's establishment is considered a theatre and duly licensed as one, and not under Division 36. The requirements of SDMC §§ 33.3610(e), (f) and (g) regulate the distance between a performer and the patrons "while on licensed premises" (i.e., licensed under Division 36). The only logical interpretation of licensed premises is a licensed nude entertainment business which is regulated under Division 36 of

the SDMC.

For arguendo even if this Court finds the ordinance to be constitutional, the Plaintiff can show through evidence at trial that the Defendant CITY has selectively enforced these ordinances and by applying them to the Plaintiff, has violated his constitutional rights under the equal protection, and due process clauses.

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G. Action For Declaratory Relief As An Appropriate Remedy.

Declaratory relief is authorized by CCP § 1060 and the action is governed by CCP §§ 1060-1062a. These provisions are found in Part Two of the CCP entitled "Civil Actions" and, hence, a declaratory relief action under CCP § 1060 is a civil action (see also CCP § 30, defining civil action, among other

things, as an action prosecuted by one party against another for the declaration of a right); Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal.2d 719, 733, 146 P.2d 673. Being a civil action, it is subject to the other applicable provisions of Part Two of the CCP, that is, to the applicable provisions in CCP §§ 307-1059.

The purpose of declaratory relief is to liquidate uncertainties and controversies which may result in future litigation (Fagerstedt v. Continental Ins. Co. (1968) 266 Cal.App.2d 370, 372 72 Cal.Rptr. 126) and, hence, to quiet or stabilize an uncertain or disputed jural relation (Tiburon v. Northwestern Pac. R.R. Co. (19970) 4 Cal.App.3d 160,173, 84 Cal.Rptr. 469) by permitting a prompt adjudication of the respective

rights and obligations of the parties (Lortz v. Connell (1969) 273 Cal.App.2d 286, 301 Cal.Rptr. 6). It enables the parties to shape their future conduct so as to avoid the breach of an obligation (see Babb v. Superior Court (1971) 3 Cal.3d 841, 848, 92 Cal.Rptr. 179, 470 P.2d 379; Watson v. Sansone (1971) 19 Cal.App.3d 1, 3, 96 Cal.Rptr. 387).

Declaratory relief actions are also proper under CCP § 1060 to secure an interpretation of city charter provisions (see, e.g., LePage v. Oakland (1970) 13 Cal.App.3d 689, 692-693, 91 [-13-] Cal. Rptr. 806), statutes, and ordinances (See, e.g., Walker v. Los Angeles County (1961) 55 Cal.2d 626, 637, 12 Cal.Rptr. 671, 361 P.2d 247; Christmat, Inc. v. Los Angeles County (1971) 15 Cal.App.3d 590, 594, 93

Cal.Rptr. 324), and to test the constitutionality of initiative measures (see, e.g., Weaver v. Jordan (1966) 64 Cal.2d 235, 240, 49 Cal.Rptr. 537, 411 P.2d 289), statutes (see, e.g., Nevada County v. Macmillen (1974) 11 Cal.3d 662, 666, 114 Cal.Rptr. 345, 522 P.2d 1345), and constitutionality of ordinances (see, e.g., California v. Superior Court (1974) 12 Cal.3d 237, 251, 115 Cal.Rptr. 497, 524 P.2d 1281; Subriar v. Bakersfield (1976) 59 Cal.App.3d 175, 194-195, 130 Cal.Rptr. 853).

Because declaratory relief actions deal with present rights to have immediate judicial assurance that advantages will be enjoyed or liability escaped in the future, where only past wrongs are involved there is no basis

for declaratory relief (Baldwin v. Marina City Properties, Inc. (1978) 79 Cal.App.3d 393, 405, 145 Cal.Rptr. 406). But if there is a reasonable expectation that the past wrong or wrongs will be repeated in the future, the controversy does not present mere academic questions resulting from mootness or other considerations and declaratory relief should not be denied (Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal.App.3d 372, 381 96 Cal.Rptr. 825; see also Mascarin Professional Pharmacy v. Hart (1970) 13 Cal.App.3d 462, 465, 91 Cal.Rptr. 560).

Because CCP § 1060 contains no suggestion that the Plaintiff must allege facts entitled him or her to a favorable decision (Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal.2d 719,

730,

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146 P.2d 673), if the complaint meets the foregoing requirements, the court must declare the rights of the parties whether or not the facts alleged estalbish [sic.] that Plaintiff is entitled to a favorable judgment (Bennett v. Hibernia Bank (1956) 47 Cal.2d 540, 550, 305 P.2d 20; Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal.App.3d 372, 377, 96 Cal.Rptr. 825; Tiburon v. Northwestern Pac. R. R. Co. (1970) 4 Cal.App.3d 160, 170, 173, 84 Cal.Rptr. 469; see also Seitlin v. Arnebergh (1963) 59 Cal.2d 901, 908, 31 Cal.Rptr. 800, 383 P.2d 152). If the plaintiff is not entitled to a favorable determination, the court should render a judgment embodying such determination

and not merely dismiss the action (Maguire V. Hibernia Sav. & L. Soc'y (1944) 23 Cal.2d 719, 731, 146 P.2d 673; Patel v. Athow (1973) 34 Cal.App.3d 727, 734, 110 Cal. Rptr. 460).

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V

CONCLUSION

Based on the foregoing it is clear that the lower court erred in a multitude of areas in granting the Defendants' Motion for Summary Judgment. Therefore, a decision of reversal should be rendered along with remanding this case to the lower court for trial.

DATED: October 27, 1989

Respectfully submitted,

/s/

SEBASTIAN D'AMICO
Attorney for Plaintiff-Appellant
PAUL A. RICHTER, dba
"THE BODY SHOP"

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VERIFICATION

I, SEBASTIAN D'AMICO, Esq., declare as follows:

1. I am an attorney at law duly licensed to practice in the State of California.

2. I am the attorney of record for Plaintiff, PAUL A. RICHTER, dba "THE BODY SHOP".

3. I know the contents of this Brief. The same is true of my own knowledge, except as to the matters which are therein stated on information and belief and as to those matters, I believe them to be true.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true

and correct.

Executed this 27th day of October, 1989, at San Diego, California.

/s/

SEBASTIAN D'AMICO

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[PROOF OF SERVICE BY MAIL]

No. 90-818

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

CERTIFICATE OF SERVICE

I, Grant Richard Telfer, declare that I am, and was at the time of service of the papers herein referred to, am the attorney of record in the within action, entitled Paul A. Richter v. The City of San Diego, et al, and am a member of the bar of this Court, representing Respondents City of San Diego and Robert Burgreen. I am a citizen of the United States, over the age of 18, and not a party to this action. My business address is 525 B St, Ste. 2100, San Diego, California 92101.

On February 19, 1991, I served the **RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT** on the following by placing one copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Sebastian D'Amico
Law Offices of Sebastian D'Amico
2366 Front Street
San Diego, Calif. 92101-1460

Stephen M. Kelly, Clerk
Court of Appeal
Fourth District, Div. One
750 B St, Ste 5000
San Diego, CA 92101

I thereafter sealed and deposited such envelope in a United States mailbox with first-class postage prepaid.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed this 19th day of February, 1991 in San Diego, California.

GRANT RICHARD TELFER, Declarant